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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-1394

CRISTOBAL ALMODOVAR-NAZARIO, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

TOTH, *Judge*: Army veteran Cristobal Almodovar-Nazario, representing himself, appeals a February 2022 Board decision that denied service connection for a right foot disability, as well as a total disability rating based on individual unemployability (TDIU). The Secretary concedes Board error as to the TDIU denial but argues that the Board's denial of service connection for a right foot disability should be upheld. The Court agrees with the Secretary on both counts.

Mr. Almodovar-Nazario filed claims for a right foot condition and TDIU in 2020. VA requested information from him regarding his employment history but he did not reply. He was provided a foot exam in which he was diagnosed with bilateral plantar fasciitis that the examiner opined was not related to service, including as due to an in-service foot callous. Both claims were denied by the regional office (RO), and the veteran appealed to the Board.

The Board denied service connection for his foot condition because the VA exam adequately demonstrated that his condition was not related to service. It found that, because the veteran was not competent to opine on the etiology of his foot condition, the single VA opinion was the only competent and most probative evidence of record regarding nexus. As for TDIU, the Board noted that he was eligible only for extraschedular TDIU because he did not meet the rating criteria for schedular TDIU. It discussed his past employment as a plant operator until 2007 but

noted that he had not provided any information about why he stopped working or which conditions prevented him from working. The Board found that, without more information, it could not conclude that he was unable to secure or follow substantially gainful employment—particularly when the medical records do not demonstrate that his service-connected conditions prevented him from working. It cited multiple 2021 exams in support of this finding. Ultimately, it denied both claims and Mr. Almodovar-Nazario appealed.

The Court reviews the Board's factual findings and weighing of the evidence for clear error. *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). This means that the Court will not disturb the Board's findings unless it "is left with the definite and firm conviction that a mistake has been committed." *Arline v. McDonough*, 34 Vet.App. 238, 248 (2021). Because he is a self-represented individual, the Court construes the veteran's briefs generously. *See Gomez v. McDonald*, 28 Vet.App. 39, 43 n.1 (2015). However, he must still carry his burden of persuasion in demonstrating error by the Board. *See Goodwin v. Peake*, 22 Vet.App. 128, 131–32 (2008).

Beginning with his right foot claim, the Court discerns two arguments from the veteran's briefs. First, he contends that the Board erred by failing to ensure that all relevant VA treatment records were obtained, specifically those from the "Mayaguez" and "Ponce" VA clinics. Informal Br. at 2. Under the Veterans Appeals Modernization and Improvement Act (VAIMA), the Board has a duty to remand a matter for correction if it identifies a duty to assist error by the RO, which can include the failure to obtain records. 38 U.S.C. § 5103A(f)(2)(A). However, as the Secretary points out, the record reflects that VA did obtain these records when it secured treatment records from the San Juan VA Medical Center, which includes the Ponce and Mayaguez clinics. R. at 60, 355–57, 630, 4075. So, there were no outstanding records from the Mayaguez or Ponce clinics that VA failed to obtain and, therefore, there is no duty to assist error.

Second, Mr. Almodovar-Nazario argues that the Board failed to apply the benefit-of-the-doubt doctrine to his claim. That doctrine states that "[w]hen there is an approximate balance of positive and negative evidence regarding any issue . . . the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102 (2022). "'[E]vidence is in approximate balance when the evidence in favor of and opposing the veteran's claim is found to be almost exactly or nearly equal.'" *Lynch v. McDonough*, 21 F.4th 776, 780 (Fed. Cir. 2021). The veteran appears to believe that, because there is a single piece of positive evidence and a single piece of negative evidence, the evidence is nearly equal, and he should be afforded the benefit of

the doubt. However, that suggests that the weighing of evidence is a neat mathematical equation, which it is not. Instead, the Board must conduct an in-depth factual analysis of each piece of evidence to determine its probative value, which includes considering things like "competence." Generally, when it comes to complex medical questions—like whether a condition is related (or has a nexus) to service—medical experts must answer them. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007) (noting that lay people will generally not be competent to answer complex medical questions, like identifying "a form of cancer"); *see also Colvin v. Derwinski*, 1 Vet.App. 171, 174-75 (1991) (holding that the Board is not competent to opine on medical questions without independent medical evidence).

Here, the Board found that the evidence supporting granting or denying the foot claim did not stand in approximate balance. This reading is supported by the record. The only evidence of record that supported a nexus between his plantar fasciitis and service were his lay statements—statements that the Board found not competent because he did not have the requisite medical training to make such an observation. *See Jandreau*, 492 F.3d at 1377. There was no other evidence that his condition was related to service. On the other side of the scale was a medical expert's opinion that his condition was not related to service. Thus, the only competent evidence of record was negative evidence—meaning that the positive and negative evidence was not equal, so the benefit of the doubt did not apply. Because the veteran has not identified any other evidence that supports his claim, the Court sees no clear error in the Board's treatment of the evidence.

Turning to the TDIU claim, the Secretary concedes that the Board failed to provide an adequate statement of reasons or bases for its decision, and the Court agrees. The Board must provide an adequate statement of reasons or bases for its decision so that the claimant can understand the precise basis of the decision and the Court can effectively review it. *Fears v. Wilkie*, 31 Vet.App. 308, 314 (2019). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejected any material evidence favorable to the claimant. *Arline*, 34 Vet.App. at 248.

Here, the Board merely provided a conclusory discussion in a single paragraph stating that the veteran's records do not support TDIU. But the Board did not explain *why*, nor did it do more than cite to a few recent VA exams, despite stating that it "carefully reviewed" his record. R. at 6. Mr. Almodovar-Nazario has numerous service-connected conditions, any one or combination of

which could give rise to extraschedular TDIU. Without a more thorough analysis, neither the veteran nor this Court can effectively understand the Board's reasoning behind its decision. The Court notes that the veteran did not provide additional information about his previous employment, but that does not relieve the Board of its duty to properly assess the impact of his service-connected conditions on his employability. *See Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009) ("A claim to TDIU benefits is not a free-standing claim that must be pled with specificity."). Remand is thus warranted for the Board to more thoroughly consider and discuss the veteran's treatment records and exams, and then readjudicate the TDIU claim.

Accordingly, the portion of the Board's February 10, 2022, Board decision denying service connection for a right foot disability is AFFIRMED. The portion of the decision denying a TDIU is VACATED and the matter is REMANDED for further adjudication consistent with this opinion.

DATED: April 21, 2023

Copies to:

Cristobal Almodovar-Nazario

VA General Counsel (027)